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Jonathan H. Adler

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## Restoring *Chevron's* Domain

Jonathan H. Adler\*

For some three decades, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>1</sup> has stood at the center of administrative law.<sup>2</sup> Although *Chevron* may have been somewhat “accidental,”<sup>3</sup> *Chevron* has been among the most important and consequential administrative law decisions of all time.<sup>4</sup> It is, according to Cass Sunstein, a “foundational, even a quasi-constitutional text” in administrative law.<sup>5</sup>

Foundational or not, *Chevron's* domain<sup>6</sup> is under siege.<sup>7</sup> In recent years, commentators have raised doubts about the doctrine's continued vitality<sup>8</sup> and

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\* Johan Verheij Memorial Professor of Law and Director of the Center for Business Law and Regulation, Case Western Reserve University School of Law. This Article is based upon remarks delivered at the 2016 *Missouri Law Review* Symposium, *A Future Without the Administrative State?*, which occurred on March 3, 2016. The author thanks Adam Parker-Lavine for research assistance. All errors or inanities are the fault of the author.

1. 467 U.S. 837 (1984).

2. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006) (identifying *Chevron* as the most cited “modern public law” decision).

3. See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 399, 399 (Peter L. Strauss ed., 2006). See also *infra* notes 17–20 and accompanying text.

4. See Michael Herz, *Chevron is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1872 (2015) (noting *Chevron* is “the Supreme Court’s most important decision regarding judicial deference to agency views of statutory meaning”).

5. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006).

6. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

7. See Catherine M. Sharkey, *In the Wake of Chevron's Retreat* 5 (2016) (unpublished manuscript), [http://administrativestate.gmu.edu/wp-content/uploads/2016/06/Sharkey\\_In-the-Wake-of-Chevron\\_5\\_20\\_16.pdf](http://administrativestate.gmu.edu/wp-content/uploads/2016/06/Sharkey_In-the-Wake-of-Chevron_5_20_16.pdf) (“*King v. Burwell* and *Michigan v. EPA* – decided within the same momentous week in June 2015 – taken together, seem to augur the Supreme Court’s retreat from the venerable *Chevron*.”).

8. See, e.g., Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007) (reporting on *Chevron's* demise); see also Herz, *supra* note 4, at 1868 (observing that three decisions during the Supreme Court’s 2014–15 Term “suggested that *Chevron's* condition was, if not terminal, at least serious”); Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 65 (2015) (noting a recent “series of opinions . . . that call *Chevron's* future into question”).

ultimate desirability.<sup>9</sup> Indeed, some have suggested *Chevron* should be ditched altogether<sup>10</sup> – if not by the courts, then perhaps by Congress.<sup>11</sup>

This brief Article's aim is not so ambitious as to praise or bury *Chevron*. It seeks only to make a more modest point about the *Chevron* doctrine and its domain.<sup>12</sup> On the assumption that *Chevron*, in some form, will remain a significant part of the constellation of administrative law, this Article suggests *Chevron*'s domain should be defined and delimited by its doctrinal grounding. Put another way, the legal rationale for providing deference to agency interpretations of ambiguous statutory text should determine the doctrine's

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9. See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (“‘[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.’ . . . *Chevron* deference precludes judges from exercising that judgment . . . . It thus wrests from Courts the ultimate interpretative authority to ‘say what the law is . . . .’” (alterations in original) (first quoting *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring); then quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803))); Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 708 (2007) (“That inquiry into the reasonableness of the agency’s ‘interpretation of the statute’ is not an adequate substitute for the arbitrary and capricious review that the APA requires.”); Patrick J. Smith, *Chevron’s Conflict with the Administrative Procedure Act*, 32 VA. TAX REV. 813, 814 (2013) (“*Chevron* also ignored the provision in section 706 of the APA requiring that, when a court reviews agency action, ‘the reviewing court shall . . . interpret . . . statutory provisions.’”) (alterations in original). Some raised concerns about *Chevron* earlier. Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 353–54 (1994) (“A less . . . fundamental problem is that *Chevron* is based on a model of courts as faithful agents – faithful agents first of the legislature, but when no instructions from the legislature can be discerned, then faithful agents of administrative decisionmakers.”).

10. See Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 850–51 (2010) (“*Chevron* is inconsistent with the APA, has not accomplished its apparent goals of simplifying judicial review and increasing deference to agencies, and has instead spawned an incredibly complicated regime that serves only to waste litigant and judicial resources.”); Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1227–37 (2016) (raising constitutional concerns about *Chevron* deference); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

11. See Separation of Powers Restoration Act, H.R. 4768, 114th Cong. (2016) (this legislation would, among other things, overturn the *Chevron* doctrine). For a discussion of this legislation, see *Separation of Powers Restoration Act of 2016: Hearing on H.R. 4768 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (2016); Christopher J. Walker, Opinion, *Courts Regulating the Regulators*, U. PENN. L. SCH.: REG BLOG (Apr. 25, 2016), <http://www.regblog.org/2016/04/25/walker-courts-regulating-the-regulators/>.

12. On the notion of *Chevron*'s domain generally, see Merrill & Hickman, *supra* note 6.

scope and application.<sup>13</sup> More precisely, insofar as the Court's subsequent application and elucidation of *Chevron* have indicated that *Chevron* deference is predicated on a theory of delegation, courts should only provide such deference when the relevant power has been delegated by Congress (even if such delegation is only implicit). Correspondingly, such deference should be withheld when such delegation is absent or cannot be presumed to have occurred. *Chevron* should only prevail when confined to its proper domain, and its domain is a product of delegation.

## I. THE ACCIDENTAL LANDMARK

*Chevron*'s two-part test is quite familiar:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>14</sup>

This test has become a fixture of administrative law. Whether or not the Court's description describes what lower courts actually do in practice,<sup>15</sup> lower courts rely upon *Chevron* quite often.<sup>16</sup> Each year federal appellate courts cite *Chevron* in over 200 cases.<sup>17</sup> But although *Chevron* is ubiquitous, its place in the pantheon of great administrative law cases requires some ex-

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13. See *id.* at 836 ("The conclusion that *Chevron* rests on an implied delegation from Congress . . . has important implications for *Chevron*'s domain . . .").

14. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (footnotes omitted).

15. See, e.g., Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009) (arguing a *Chevron* analysis only requires one step).

16. See Kent H. Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2808848](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808848).

17. Westlaw indicates that, between 2011 and 2015, *Chevron* has been cited by federal appellate courts approximately 230 times per year. Citing References for *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), WESTLAW, [www.next.westlaw.com](http://www.next.westlaw.com) (last visited Sept. 8, 2016).

planation. When it was first decided, few recognized its significance.<sup>18</sup> The Justices seemed unaware they were erecting a substantial edifice.<sup>19</sup> There is no indication that *Chevron*'s author, Justice John Paul Stevens, sought to break new ground, let alone define the contours of judicial review of administrative agency statutory interpretations for years to come.

*Chevron*'s significance grew over time as judges on the U.S. Court of Appeals for the D.C. Circuit and the Executive Branch deployed *Chevron*'s famous test to blunt judicial review and carve out greater freedom for administrative action.<sup>20</sup> The Reagan and Bush Administrations, in particular, saw *Chevron* as a way to facilitate greater executive control over regulatory policy.<sup>21</sup>

Justice Stevens's ambitions while drafting *Chevron* may have been modest, but the effects of his decision have been quite expansive. Given the breadth of delegation in the modern administrative state, granting deference to agency interpretations of the statutes they implement augments the scope of agency power. Congress enacts lengthy statutes laden with gaps and ambiguities conferring broad regulatory authority to federal agencies, which, in turn, are granted the responsibility and authority to offer conclusive interpretations of what these statutes mean.<sup>22</sup> Although courts are not supposed to consider agency views in the threshold inquiry,<sup>23</sup> this is a limitation honored in the breach.<sup>24</sup>

18. See Merrill, *supra* note 3, at 402 ("But *Chevron* was little noticed when it was decided, and came to be regarded as a landmark case only some years later.").

19. See *id.* at 417; see also Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ENVTL. L. REP. 10637, 10644 (2005).

20. See Merrill, *supra* note 3, at 422.

21. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1087 (2008) ("Almost immediately, Reagan Administration officials and appointees proclaimed a '*Chevron* Revolution.'"); Merrill, *supra* note 3, at 424 ("The Democratic judges were likely somewhat hostile to the deregulatory initiatives of the Reagan Administration, and would seek some way to strike them down. . . . The newly-appointed Republican judges, in contrast . . . would be eager to find some way to uphold these initiatives. Perhaps these Republican judges seized upon *Chevron* as the most effective weapon at hand for upholding controversial administrative decisions."); see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2372–80 (2001) (discussing how *Chevron* can and should facilitate greater White House control of agencies).

22. See CURTIS W. COPELAND, CONG. RESEARCH SERV., R41472, RULEMAKING REQUIREMENTS AND AUTHORITIES IN THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 4 (2010) ("CRS searches of the Dodd-Frank Act identified a total of 330 provisions that expressly indicated in the text that rulemaking is required or permitted. For a variety of reasons, however, the number of final rules that will be ultimately issued pursuant to the act is unknowable.").

23. See *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005) ("The first question, whether there is such an ambiguity, is for the court, and we owe the agency

In offering their interpretations, agencies not only resolve ambiguities, they exercise policy judgment about how regulatory regimes should be implemented and enforced. This means, in practice, *Chevron* deference does not merely concern the semantic meaning of statutes. It extends to policy choice as well.<sup>25</sup> If agency interpretations of ambiguous or incomplete statutory texts are to be given conclusive effect, as *Chevron* seems to require, federal agencies have more room to direct federal regulatory policy.

## II. GROUNDING *CHEVRON*

Whether due to its accidental provenance or not, *Chevron* was not particularly well grounded at its inception. The opinion itself was conceived as an application of well-settled practice<sup>26</sup> and offered multiple potential explanations for conferring deference to agency interpretations. Accordingly, there has been much debate about how to understand *Chevron*'s rationale.<sup>27</sup>

One justification for giving deference to agency interpretations of statutes they implement is comparative institutional competence.<sup>28</sup> Agencies, as institutions, may possess a comparative advantage at interpreting the meaning of statutory provisions they implement. Agency officials are likely to be far more familiar with the particulars of a given statutory regime, the subjects to which the statute applies, and how different interpretations or applications may advance (or frustrate) the legislature's purposes than are judges (or even

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no deference on the existence of ambiguity."); see also *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc), *amended*, 38 F.3d 1224 (D.C. Cir. 1994); see also *City of Arlington v. FCC*, 133 S. Ct 1863, 1877 (2013) (Roberts, C.J., dissenting) ("An agency cannot exercise interpretive authority until it has it; . . . whether an agency enjoys that authority must be decided by a court, without deference to the agency.").

24. If agency expertise is a justification for *Chevron* deference, and, as Christopher Walker has demonstrated, agencies participate in legislative drafting, see Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1037 (2015) ("[N]early eight in ten [federal agencies] (78%) indicated that their agency always or often participates in a technical drafting role for the statutes it administers . . ."), some suggest courts should consider agency views when determining whether a statute is ambiguous. Sharkey, *supra* note 7, at 29–31 (discussing implications of agency participation in legislative drafting).

25. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984) ("If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." (quoting *United States v. Shimer*, 367 U.S. 374, 382–83 (1961))).

26. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512–13 (noting that "courts have been content to accept 'reasonable' executive interpretations of law for some time").

27. See Eskridge & Baer, *supra* note 21, at 1088.

28. *Id.* at 1147.

legislators). Indeed, agency officials may be responsible for portions of the relevant statutory text.<sup>29</sup>

Another justification is political accountability.<sup>30</sup> Agency officials are subject to presidential appointment and (at least outside of independent agencies) presidential removal as well.<sup>31</sup> The most significant and substantial agency actions, such as the promulgation of economically significant regulations, are subject to White House review through the Office of Information and Regulatory Affairs.<sup>32</sup> Insofar as adopting a particular statutory interpretation entails some degree of policy judgment, agency officials are likely to adopt those statutory interpretations that are consistent with the reigning administration's policy preferences.

Agencies are not only more accountable than judges, they may also have a greater understanding of legislative intent and purposes. Agency officials may have played a role in the drafting process. At the same time, they are likely to be cognizant of legislative preferences when implementing and interpreting statutory provisions. When agencies go astray, members of Congress may intervene. Legislative oversight and control over the appropriations process discipline agency action, at least on the margin.

The combination of executive and legislative pressures ensures that agency interpretations will be responsive to political concerns. Judges, on the other hand, are more insulated from such political pressures. This, combined with the relative lack of expertise among the judiciary, means that judicial interpretations of ambiguous statutory provisions, while perhaps more semantically satisfying, will be less responsive to political forces, and the judges themselves will be largely unaccountable for their decisions.

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29. See Walker, *supra* note 24, at 1037 (“[N]early four in five rule drafters reported that their agencies always or often participate in a technical drafting role of statutes they administer, whereas three in five indicated that their agencies similarly participate in a policy or substantive drafting role.”).

30. *Id.* at 1064. See also Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations*, 40 J. LEGAL STUD. 85, 91 (2011) (“Many of these scholars conclude that the need for agencies to respond flexibly to changing circumstances militates in favor of deferring just as much to revised agency interpretations as to initial agency interpretations . . . . A powerful additional argument for this position invokes the importance of political accountability: changes in an agency’s interpretive position may reflect changes in the agency’s political priorities – often triggered by a change in the presidential administration . . .”).

31. See Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541, 2544 (2011) (under the reasoning of *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), “agency independence is unconstitutional because it insulates the heads of independent agencies from the President’s removal power and consequently contravenes the constitutional structure that vests the executive power and accountability for the executive branch in the President”).

32. See Christopher C. Demuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1075–76 (1986).

Empowering agencies to offer authoritative interpretations of ambiguous federal laws also serves the goal of uniformity within the federal system.<sup>33</sup> If federal law is federal law, it should apply uniformly throughout the nation. Leaving the interpretation of ambiguous or unclear statutes to the courts can result in different interpretations applying in different places (at least until the Supreme Court resolves such questions, should it choose to do so). A federal agency interpretation to which courts are obliged to defer, on the other hand, provides for a single nationwide interpretation of the relevant statute.

Expertise, accountability, and uniformity are all *policy* reasons for deferring to agencies over judges in the interpretation of ambiguous statutory phrases. They are reasons why Congress might prefer to confer interpretive authority to agencies over courts. Legislators may also conclude that agencies are more faithful (or more controllable) agents than courts. But whatever the merits of such arguments, they do not provide a *legal* basis for *Chevron*.

The above are reasons why Congress might choose to enact a deference regime, but they are not evidence that Congress has actually done so. Indeed, there is little evidence that Congress has adopted such a generalized presumption that agencies are due deference in their interpretations.<sup>34</sup> To the contrary, the plain text of the Administrative Procedure Act ("APA") would seem to suggest just the opposite. Section 706 of the APA provides that courts are to "decide all relevant questions of law," including the meaning of "statutory provisions."<sup>35</sup> This would seem to preclude a blanket doctrine of ceding interpretive primacy to administrative agencies. After all, the semantic mean-

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33. See Merrill & Hickman, *supra* note 6, at 861 ("[I]f we insist that courts always have the final say about the meaning of federal statutes, the increasingly common result will be that federal law will come to mean different things in different circuits. Other than the Supreme Court, the only entities with the power to adopt nationally uniform interpretations are the federal administrative agencies. Consequently, if uniformity cannot be achieved by pushing interpretational conflicts up to the Supreme Court, it may be necessary to resolve these conflicts by pushing them down to the agency level."); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987) ("When national uniformity in the administration of national statutes is called for, the national agencies responsible for that administration can be expected to reach single readings of the statutes for which they are responsible and to enforce those readings within their own framework.").

34. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995–96 (2013) (reporting legislative drafters surveyed "realize[d] that courts use ambiguity as a signal of delegation" but this "does not mean that they intend to delegate whenever ambiguity remains in finalized statutory language").

35. 5 U.S.C. § 706 (2012) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").



ing of a given statutory provision is precisely the sort of legal question the APA assigns to the courts.

Although others have suggested that *Chevron* has a constitutional<sup>36</sup> or common law<sup>37</sup> foundation, the Court has made clear that *Chevron* is, in fact, premised on a delegation of interpretive and policymaking authority from Congress to implementing agencies.<sup>38</sup> There is no statutory provision, in the APA or elsewhere, instructing courts to defer to agency interpretations of ambiguous statutory texts. Nonetheless, *Chevron* deference rests on a presumption that such delegation has in fact occurred.<sup>39</sup> As Chief Justice Roberts explained in *King v. Burwell*, *Chevron* “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”<sup>40</sup>

The delegation foundation of *Chevron* does have constitutional roots. It is a function of the initial and exclusive allocation of legislative authority to the Congress in Article I.<sup>41</sup> As a consequence, administrative agencies have no inherent power.<sup>42</sup> Federal agencies only have that authority and power that Congress delegates to them.<sup>43</sup> A federal agency’s power to interpret statutory language – and, in the process, to define the contours of legal rights and

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36. See, e.g., Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 286 (1988) (“[T]he importance of judicial deference to administrative action is derived from the separation of powers. Recognizing this cannot truly be said to slight the appropriate role of the court to ‘say what the law is.’”); see also Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 283 (1986).

37. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 618–19 (1992); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 345–54 (2000).

38. See, e.g., *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (“A precondition to deference under *Chevron* is a congressional delegation of administrative authority.”).

39. See Merrill & Hickman, *supra* note 6, at 836 (“*Chevron* rests on implied congressional intent.”); *id.* at 855 (“A finding that there has been an appropriate congressional delegation of power to the agency is critical under *Chevron*.”).

40. See *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), *superseded by statute*, Family Smoking Prevention & Tobacco Control Act, 21 U.S.C.A. §§ 387–387u (West 2016)); see also *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (“A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme.”).

41. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

42. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”).

43. See *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”).

obligations under federal law – only extends as far as it has been delegated by the legislature in a validly enacted statute.<sup>44</sup> If an agency is to exercise interpretive authority and control how a federal law is to be interpreted and applied in federal court, that power must come from Congress. The policy judgment that certain policy questions may be resolved by administrative action is for Congress to make.

Although Congress must delegate interpretive authority to agencies, few statutes expressly provide for such delegation. That Congress intends each ambiguity as a delegation of authority may be a “legal fiction.”<sup>45</sup> There is evidence that legislative staff are aware of *Chevron* and consider its application when drafting legislative language.<sup>46</sup> Nonetheless, there is good reason to doubt that members of Congress have the specific intent to delegate conclusive interpretive authority to federal agencies in each and every legislative enactment that does not specify otherwise.<sup>47</sup> Indeed, legislative drafters may not even be aware of the latent ambiguities that reside in their handiwork. Regardless, this legal fiction provides *Chevron*'s legal foundation.

Subsequent Court opinions have made clear that *Chevron*'s foundation rests on a theory of delegation.<sup>48</sup> *Mead*, in particular, adopts a delegation theory of *Chevron* deference.<sup>49</sup> Since the passing of *Mead*'s lone dissenter, nothing has changed.<sup>50</sup> Once again, the delegation theory of *Chevron* was reaffirmed at the close of the last Term in *Encino Motorcars, LLC v. Navarro*, in which the Court unanimously reaffirmed the need for agencies to explain the basis for their statutory interpretations.<sup>51</sup>

44. *Id.* at 358.

45. See Herz, *supra* note 4, at 1876 (“[I]t is hard to find anyone who does not consider congressional delegation a fiction.”); Lisa Schulz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2009 (2011) (noting *Chevron* “rests on a legal fiction”); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 749 (2002) (“*Chevron* deference revolves around the fiction of a congressional delegation . . .”).

46. See Gluck & Bressman, *supra* note 34, at 901.

47. Krotoszynski, *supra* note 45, at 742.

48. See Gluck, *supra* note 8, at 94–96.

49. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). As Eskridge and Baer observe, “*Mead* appears to have partially settled the debate within the Court about the conditions for triggering *Chevron* deference.” Eskridge & Baer, *supra* note 21, at 1123.

50. Justice Scalia was the sole dissenter in *Mead*. See *Mead*, 533 U.S. at 239 (Scalia, J., dissenting).

51. 136 S. Ct. 2117, 2125 (2016) (“*Chevron* deference is not warranted where the regulation is ‘procedurally defective’ – that is, where the agency errs by failing to follow the correct procedures in issuing the regulation.” (quoting *Mead*, 533 U.S. at 227)). Although Justice Thomas and Justice Alito dissented, they agreed with the majority on this point. See *id.* at 2129 (Thomas, J., dissenting) (“I agree with the majority’s conclusion that we owe no *Chevron* deference to the Department’s position

The Court's holding that *Chevron* deference requires legislative delegation of the authority to make a conclusive policy judgment and that an agency must have arrived at its statutory interpretation in the course of exercising such power are necessary corollaries of a delegation theory of *Chevron*.<sup>52</sup> While the Supreme Court has grounded *Chevron* deference in a theory of delegation, it has inconsistently embraced the consequences of such a conception of *Chevron* in subsequent cases.<sup>53</sup>

### III. CONSEQUENCES

The theoretical grounding of a doctrine should shape how that doctrine is applied. *Chevron*'s foundation, therefore, should define and delimit *Chevron*'s domain. If *Chevron*, properly understood, is grounded in the legislature's delegation of authority to administrative agencies, several things should follow. Among them are the following.

First, ambiguity is not enough to trigger *Chevron* deference. As *Mead* indicated, ambiguous statutory language is a necessary, but not sufficient, condition for *Chevron* deference.<sup>54</sup> More is required.<sup>55</sup> Specifically, there must be an indication that Congress has delegated an agency the authority to act with the force of law, such as through a notice-and-comment rulemaking, and the agency must have exercised such power when putting forth its interpretation.<sup>56</sup> This means not only that the agency must have exercised its delegated power to promulgate rules or otherwise act with the force of law, but that it also fulfilled all of the relevant procedural requirements.<sup>57</sup>

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because 'deference is not warranted where [a] regulation is "procedurally defective."' (alteration in original) (quoting *id.* at 2125 (majority opinion)).

52. See *Mead*, 533 U.S. at 226–27 (“[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”).

53. See *infra* notes 60–62 and accompanying text (discussing *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877 (2013)).

54. *Mead*, 533 U.S. at 226–27.

55. See *City of Arlington*, 133 S. Ct. at 1875 (Breyer, J., concurring) (“[T]he existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant.”).

56. *Mead*, 533 U.S. at 240 (“We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”).

57. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

Under *Mead*, *Chevron*'s two steps should be preceded by a robust "Step Zero."<sup>58</sup> If delegation is the source of an agency's power to resolve statutory ambiguities, then such a delegation of authority must be found *before* deference is given.<sup>59</sup> An agency interpretation is only eligible for deference if it is adopted pursuant to an exercise of delegated power.<sup>60</sup> Further, contrary to the Court's opinion in *City of Arlington v. FCC*, an agency should not – indeed, cannot – receive deference on the question of whether such power has been delegated.<sup>61</sup> Put another way, there should be no deference on matters concerning the existence or scope of an agency's regulatory jurisdiction.<sup>62</sup>

To say that a finding of delegation is a necessary predicate for deference does not necessarily mean that any and all such delegations must be explicit. Congress drafts statutes with an awareness of *Chevron* deference but rarely makes explicit in statutory provisions its intent to defer.<sup>63</sup> As *Mead* indicates, the delegation of authority may be implicit in a given regulatory or administrative scheme.<sup>64</sup> Nonetheless, this delegation must be shown. Just as Congress cannot be presumed to "hide elephants in mouseholes,"<sup>65</sup> delegation must be demonstrated, not merely presumed.

Where it is unlikely or implausible that Congress would have delegated interpretive authority to an administrative agency, there should be no *Chevron* deference. As the Court has said in various cases – most recently *King v. Burwell* – courts should be reluctant to defer to agencies on questions of major economic or political significance.<sup>66</sup> It is extremely unlikely that Congress would delegate the responsibility for resolving such questions to admin-

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58. See Sunstein, *supra* note 5, at 208 ("If the underlying theory involves implicit (and fictional) delegation, the real question is when Congress should be understood to have delegated law-interpreting power to an agency."). While "Step Zero" questions are analytically prior to the traditional two-step *Chevron* inquiry, courts need not always proceed through these steps in a chronological sequence. If the relevant statutory text is sufficiently clear, a reviewing court may not need to consider more.

59. As the Chief Justice argued in his *City of Arlington* dissent, that Congress delegated some authority to an agency is insufficient. See 133 S. Ct. at 1881 (Roberts, C.J., dissenting). What is required is that Congress delegated authority pursuant to the statutory provisions at hand. *Id.*

60. See Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1532–54 ("[T]he no-deference rule is implied by the very nature of administrative agencies – agencies have no inherent powers, and can act only to the extent that Congress has delegated them the power to do so.").

61. *Id.* at 1532.

62. *Id.*

63. See Gluck & Bressman, *supra* note 34, at 996.

64. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

65. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

66. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

istrative agencies.<sup>67</sup> Indeed, the delegation of some such questions might raise constitutional questions.<sup>68</sup>

A delegation theory of *Chevron* may also preclude deference concerning certain types of questions. It is one thing to presume that Congress has delegated to an agency interpretive authority to resolve a specific ambiguity within a statutory provision that the agency administers. It is something else to defer to an agency when the relevant question is whether a statutory delegation has occurred at all. As Chief Justice Roberts counseled in *City of Arlington*:

A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.<sup>69</sup>

The Chief Justice wrote these words in dissent, but it is not difficult to hear their echo in his opinion for the Court in *King v. Burwell*. A majority of his colleagues may have been unwilling to conclude *Chevron* does not apply to agency interpretations concerning the scope of its own jurisdiction, but a majority signed on when he revived the major questions doctrine in *King*.<sup>70</sup>

#### IV. BEYOND MAJOR QUESTIONS

The major questions doctrine is consistent with *Chevron*, as currently conceived, because courts may presume it is unlikely that Congress would delegate such matters to regulatory agencies without having made such an intention explicit. As the Court has said on repeated occasions, it does not

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67. *Id.* at 2489 (availability of tax credits on exchanges established by the federal government is “a question of deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly”).

68. *See Sales & Adler, supra* note 60, at 1539.

69. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting).

70. *See King*, 135 S. Ct. 2480; *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). As Abbe Gluck notes, the *King* decision suggests that “not every ambiguity in an imperfect and complicated statute creates interpretive space for the agency.” *See Gluck, supra* note 8, at 96. Rather, *Chevron* applies “only for mundane or confined questions that do not implicate the functionality of the overall statutory structure.” *Id.* Of note, however, Justice Kennedy was the only Justice to join Chief Justice Roberts in both opinions.

lightly presume that Congress has hidden an elephant in a mousehole.<sup>71</sup> This principle is not limited to questions of major political or economic significance, however.<sup>72</sup> The magnitude or consequence of a given policy question may be such that courts should pause before presuming Congress has delegated the question to the agency, but this is not the only reason for courts to pause before presuming such a delegation of authority.

In some cases, the nature of a statute's enactment may serve the same function as a question of major economic or political significance. Consider *King v. Burwell*. As has been extensively documented, the Affordable Care Act ("ACA") went through a highly unusual legislative process.<sup>73</sup> As the Chief Justice noted in his *King* opinion, the statute was anything but a model of careful draftsmanship.<sup>74</sup> The use of the reconciliation process to enact a statute of this size and scope was unprecedented, and the statute was never subject to a House-Senate conference in which the kinks could have been ironed out.<sup>75</sup> Nor was there a conference report or other document detailing the role and operation of each relevant provision.

In *King*, the Court suggested that the question of whether tax credits were available in states with federally established exchanges was too consequential to leave to the IRS.<sup>76</sup> Although unstated, the process through which the ACA was enacted could reinforce this conclusion. Had Congress enacted the ACA in a more regular and considered fashion – and not revised and enacted in a rush – it might have been reasonable for the Court to conclude that Congress had delegated resolution of this question to the IRS, even though such a delegation would have left the IRS with the awesome power to deter-

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71. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006); *Bilski v. Kappos*, 561 U.S. 593, 645 (2010).

72. See *King*, 135 S. Ct. at 2483.

73. See Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 124–26 (2013); Gluck, *supra* note 8, at 76–77; Jonathan H. Adler & Michael F. Cannon, *King v. Burwell and the Triumph of Selective Contextualism*, 2015 CATO SUP. CT. REV. 35, 42–43.

74. *King*, 135 S. Ct. at 2484; *id.* at 2492 ("Congress wrote key parts of the Act behind closed doors, rather than through the traditional legislative process. And Congress passed much of the Act using a complicated budgetary procedure known as reconciliation, which limited opportunities for debate and amendment, and bypassed the Senate's normal 60-vote filibuster requirement. As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation.") (citations omitted).

75. Adler & Cannon, *supra* note 73, at 125.

76. *King*, 135 S. Ct. at 2483 ("[H]ad Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.") (citation omitted).

mine whether millions of Americans were eligible for tax credits.<sup>77</sup> It would be one thing to conclude that Congress intended to delegate such power where Congress carefully considered the relevant language and its implications. It would be quite another thing, however, to believe that Congress had delegated authority without ever even hinting as much. The unusualness of a delegation of such magnitude, combined with the way the ACA was enacted, both counsel against presuming any such delegation would have been intended.

*Chevron* suggests that a statutory silence – a failure of Congress to address a particular question – may provide the sort of ambiguity that constitutes an implicit delegation of authority.<sup>78</sup> Justice Stevens’s opinion speaks of ambiguities that arise when a statute is “silent” on the relevant question.<sup>79</sup> Whatever the merits of such an argument where Congress has enacted a statute through the usual process,<sup>80</sup> it would seem to have no bearing when a statute is not subject to the sort of internal deliberation in which a decision to delegate authority to an agency would have been made. If we are to presume that legislators draft statutes in light of *Chevron* and implicitly delegate interpretive authority in the process, this assumption should be grounded in assumptions about the regularity of the legislative process.

Where a statute is not simply ambiguous, or even silent, on a matter, but “Janus-faced”<sup>81</sup> or internally contradictory, there are additional reasons for courts to pause before deferring. The Court faced such a statute in *Scialabba v. Cuellar de Osorio*, in which the relevant statute was self-contradictory but failed to recognize the implications of *Chevron*’s foundation for its application in such a case.<sup>82</sup>

At issue in *Scialabba* was a complex question of immigration law: how to determine the priority date for visa applications of U.S. citizens’ family members and lawful permanent residents who applied for visas as minors but “age out” while waiting for their applications to be processed.<sup>83</sup> The relevant statutes, as amended by the Child Status Protection Act (“CSPA”), were anything but clear, at least as applied to some applicants. Indeed, as some of the

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77. As came out in oral argument, one consequence of leaving this question to the IRS would be that subsequent administrations could reverse this interpretation of the relevant statutory provisions.

78. *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

79. *Id.* at 843 (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

80. For an argument that silences should not be considered such an ambiguity, see Sales & Adler, *supra* note 60, at 1500–59.

81. *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality).

82. *Id.* at 2213.

83. *Id.* at 2201. As Justice Kagan wryly observed, only “hardy readers” could be expected to wade through the Court’s opinion, let alone the relevant statutory provisions. *Id.* at 2203.

Justices concluded, the relevant provision addressed one set of visa applicants in “divergent ways.”<sup>84</sup> The relevant statutory provisions seemed to conflict with one another, forcing the Court to consider whether an intra-statutory conflict would constitute (or create) the sort of ambiguity that could trigger *Chevron* deference.<sup>85</sup>

On a theory of *Chevron* grounded in agency expertise and political accountability, the case for deference would be strong. Insofar as *Chevron* is premised upon delegation, however, such a theory has problems. It is one thing to say that a gap or ambiguity constitutes an implicit delegation to fill in the details but quite another to (in effect) conclude that when Congress has enacted conflicting details, it delegated to the agency the power to choose which detail should control. To so hold is to conclude that Congress has delegated to an agency the power to correct Congress's mistakes.<sup>86</sup>

Writing for herself and two others, Justice Kagan had no problem concluding that *Chevron* should apply. In her telling, *Scialabba* was “the kind of case *Chevron* was built for.”<sup>87</sup> Given Kagan's academic work grounding *Chevron* in political accountability and Executive Branch policymaking, this is not surprising.<sup>88</sup> What may be surprising, however, is that her opinion made no effort to reconcile its holding with *Mead* and effectively side-stepped the question of whether an intra-statutory conflict should really be read as an implicit delegation of interpretive authority. The “self-contradictory” nature of the provisions at issue rendered them ambiguous, and, in Justice Kagan's view, that was enough to trigger *Chevron* deference.<sup>89</sup>

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84. *Id.* at 2203–04. Some of the Justices, however, believed the provisions that appeared to be in conflict with one another could be reconciled, obviating the need to defer to the agency. See, e.g., *id.* at 2214–15 (Roberts, C.J., concurring); *id.* at 2216 (Alito, J., dissenting); *id.* at 2217 (Sotomayor, J., dissenting).

85. *Id.* at 2214 (Roberts, C.J., concurring).

86. *Cf.* *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1043–44 (D.C. Cir. 2001) (“Lest it ‘obtain a license to rewrite the statute,’ . . . we do not give an agency alleging a scrivener's error the benefit of *Chevron* step two deference, by which the court credits any reasonable construction of an ambiguous statute. Rather, the agency ‘may deviate no further from the statute than is needed to protect congressional intent.’” (quoting *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998))).

87. *Scialabba*, 134 S. Ct. at 2213.

88. See Kagan, *supra* note 21, at 2373 (“As first conceived, the *Chevron* deference rule had its deepest roots in a conception of agencies as instruments of the President, entitled to make policy choices, within the gaps left by Congress, by virtue of his relationship to the public.”); David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 213.

89. *Scialabba*, 134 S. Ct. at 2203 (“[I]nternal tension makes possible alternative reasonable constructions, bringing into correspondence in one way or another the section's different parts. And when that is so, *Chevron* dictates that a court defer to the agency's choice . . .”).



Chief Justice Roberts, while concurring in the result, refused to endorse Justice Kagan's *Chevron* revisionism.<sup>90</sup> As he wrote for himself (and Justice Scalia), he considered Justice Kagan's "suggest[ion] that deference is warranted because of a direct conflict between [statutory] clauses . . . wrong."<sup>91</sup> As he explained, under *Chevron*, "courts defer to an agency's reasonable construction of an ambiguous statute because we presume that Congress intended to assign responsibility to resolve the ambiguity to the agency," but no such assumption can be made where Congress simultaneously enacts conflicting provisions.<sup>92</sup> The Chief elaborated: "Direct conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense."<sup>93</sup>

Justice Kagan only wrote for three members of the Court in *Scialabba*, but the Court may soon be confronted with another case of an intra-statutory conflict, albeit one of an even more unusual variety. Among the many questions raised in pending legal challenges to the Environmental Protection Agency's Clean Power Plan ("CPP") is how to handle an apparent statutory conflict created by the Clean Air Act Amendments of 1990.<sup>94</sup> When Congress revised the Clean Air Act ("CAA") in 1990, it enacted two separate (and conflicting) revisions to the antecedent statutory provision.<sup>95</sup> This is an intra-statutory conflict, but it is also something more, for the question is not merely what the statute means but what the statute *is*. As such, it should present an even more unlikely candidate for *Chevron* deference.

Here is some background. The CPP is an effort to control greenhouse gas emissions from existing power plants, coal-fired power plants in particular, under § 111(d) of the CAA.<sup>96</sup> Under this provision, the EPA identifies the "best system of emission reduction" that has been "adequately demonstrated" for a given source category.<sup>97</sup> This becomes the standard of performance that existing sources must meet. Pursuant to the CAA's structure of

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90. *Id.* at 2214 (Roberts, C.J., concurring).

91. *Id.*

92. *Id.* ("[W]hen Congress assigns to an agency the responsibility for deciding whether a particular group should get relief, it does not do so by simultaneously saying that the group should and that it should not.").

93. *Id.*

94. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830-01, 34853 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60). See *Environmental Law – Clean Air Act – EPA Interprets the Clean Air Act to Allow Regulation of Carbon Dioxide Emissions from Existing Power Plants. – The Clean Power Plan*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60), 129 HARV. L. REV. 1152 (2016).

95. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830-01, 34853 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

96. 42 U.S.C. § 7411(d) (2012).

97. *Id.* § 7411(a)(1).

“cooperative federalism,” states are then expected to develop implementation plans under which sources within each state will meet the emission targets.<sup>98</sup> Should states refuse to develop implementation plans, the CAA empowers the EPA to impose an implementation plan of its own in order to achieve the same level of emission reductions.<sup>99</sup>

Whatever its legal merits, the CPP represents the most ambitious effort to reduce domestic greenhouse gas emissions yet attempted. The plan's goal is to reduce power plant emissions by 32 percent (below 2005 levels) by 2030.<sup>100</sup> This is significant because power plants are responsible for the lion's share of greenhouse gas emissions.<sup>101</sup> As such, whether the EPA has statutory authority to impose and implement the CPP would seem to represent the sort of major question for which *Chevron* deference is inappropriate. Whether and how to reduce greenhouse gas emissions to this degree is clearly a matter of major economic and political significance, yet there is more.

Section 111(d) is not so much ambiguous as it is at war with itself. This is because Congress enacted two separate revisions to § 111(d) in two separate parts of the CAA Amendments of 1990. The language currently in the U.S. Code says the EPA cannot use § 111(d) to regulate air pollutants that are “emitted from a source category” regulated under § 112.<sup>102</sup> Because power plants are currently subject to regulation under § 112, albeit for the purpose of controlling other pollutants, this would suggest that the EPA lacks the au-

98. *Id.* § 7411(c).

99. *Id.* § 7411(d)(2).

100. *Overview of the Clean Power Plan: Cutting Carbon Pollutants from Power Plants*, EPA 2, <https://www.epa.gov/sites/production/files/2015-08/documents/fs-cpp-overview.pdf> (last visited Oct. 24, 2016).

101. *Learn About Carbon Pollution from Power Plants*, EPA, <http://epa.gov/cleanpowerplan/learn-about-carbon-pollution-power-plants> (last updated July 27, 2016) (“Fossil fuel-fired power plants are the largest source of U.S. CO2 emissions.”). In 2016, however, transportation emissions rose above those from power plants. See Brad Plumer, *Power Plants Are No Longer America's Biggest Climate Problem*, *Transportation Is.*, VOX MEDIA, <http://www.vox.com/2016/6/13/11911798/emissions-electricity-versus-transportation> (last updated June 13, 2016, 11:10 AM).

102. 42 U.S.C. § 7411(d)(1) (“The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.”).

thority to regulate greenhouse gas emissions from such sources under § 111(d).<sup>103</sup> Yet it is not that simple, as the other amendment to § 111(d) would seem to allow such regulation to proceed.

The potential statutory conflict in § 111(d) is particularly important because it implicates the EPA's authority to enact the CPP in the first place. The relevant language may be subject to alternative readings, upon which the EPA's legal position could be sustained (and the EPA argues as such). But the EPA has also argued that, insofar as there is uncertainty as to how Congress amended the relevant statutory language – and therefore a degree of uncertainty as to what the relevant statutory language is – the agency should receive *Chevron* deference on this point.<sup>104</sup>

This argument for *Chevron* deference cannot be sustained on *Chevron*'s delegation foundation. Congress erred in making simultaneous conflicting amendments to the U.S. Code. An error is not an implicit delegation of authority, and there is no basis upon which to presume that Congress would have intended it as such. Indeed, such a delegation would raise serious constitutional concerns – concerns far greater than those implicated by even the broadest *Chevron* delegations.<sup>105</sup> For Congress to delegate to the EPA the authority to determine which amendment to the CAA is the law is for the legislature to delegate to the executive the power to determine what is the enacted law.<sup>106</sup> If it is unconstitutional for Congress to delegate to the Executive Branch authority to excise unwanted portions of enacted legislation, it is difficult to see how a delegation of authority to choose which provisions that otherwise satisfied bicameralism and presentment are to be considered the law.<sup>107</sup> Thus, whatever else the Court concludes should it consider the CPP, it should refrain from conferring *Chevron* deference to the EPA.

103. See generally 42 U.S.C. § 7412.

104. Brief for Respondent EPA at 62, *In re Murray Energy Corp.*, 788 F.3d 330 (1st Cir. 2015) (Nos. 14-1112, 14-1151, 14-1146), 2015 WL 661318, at \*52 (“Where internal tension in a statute makes possible alternative reasonable constructions, *Chevron* dictates that a court defer to the agency’s . . . expert judgment about which interpretation fits best with, and makes the most sense of, the statutory scheme.” (quoting *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality))).

105. See Sales & Adler, *supra* note 60, at 1539.

106. See Laurence H. Tribe & Peabody Energy Corp., Comment Letter on Proposed Rule to Issue Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 27, 28 (Dec. 1, 2014), [http://www.masseygail.com/pdf/Tribe-Peabody\\_111\(d\)\\_Comments\\_\(filed\).pdf](http://www.masseygail.com/pdf/Tribe-Peabody_111(d)_Comments_(filed).pdf) (“If EPA were permitted to choose which of the two versions of Section 111 it preferred to enforce, the agency would move beyond its proper role of ensuring that the law is faithfully *executed* and instead assume *lawmaking* power . . . . [I]f Congress had indeed enacted two different versions of Section 111(d) in 1990, *Chevron* would confirm in EPA a wholly extra-constitutional latitude to choose between them.”).

107. *Clinton v. New York*, 524 U.S. 417, 438 (1998) (“There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”).

## V. CONCLUSION

*Chevron* is the law of the land and is likely to remain a key part of administrative law for years to come. Although some academics and politicians seem ready to throw *Chevron* overboard, it is unlikely a majority of the Court feels the same way. Accidental or not, *Chevron* deference will remain part of the administrative law firmament.

*Chevron* may persist, but it should be constrained by its foundations. As the Chief Justice suggested in *City of Arlington*, *Chevron* is not an excuse for courts to abdicate their responsibilities. The doctrine does not give agencies *carte blanche*. Rather, *Chevron* provides agencies with fulsome deference to their statutory interpretations when agencies are acting pursuant to, and within the scope of, legislative delegation of authority. *Chevron* may rule, but it should only do so within *Chevron*'s domain.

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